

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Assessment and Collection of Regulatory
Fees for Fiscal Year 2005

MD Docket No. 05-59

COMMENTS OF TYCO TELECOMMUNICATIONS (US) INC.

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SUMMARY

Tyco Telecommunications (US) Inc. (“Tyco”) urges the Commission to adopt Tyco’s longstanding proposal to modify the regulatory fee regime for private submarine cable operators. Specifically, the Commission should reclassify private submarine cable operators in a fee category separate from international bearer circuit fees (“IBC fees”), allocate the international bearer circuit revenue requirement between the two categories in accordance with the Act, and apply a flat per-cable-landing-license fee for private submarine cable operators.

Tyco believes that the Commission has ample legal justification—and indeed is compelled—to amend its regulatory fee schedule to reclassify private submarine cable operators and establish a new regulatory fee for such operators. The regulatory fees paid by private submarine cable operators are no longer “reasonably related to the benefits provided to the payor of the fee by the Commission’s activities,” as the Communications Act otherwise requires. The Commission therefore should, and must, use its “permitted amendment” authority to reclassify private undersea cable operators in a new and separate fee category using a methodology, such as a per-system flat fee, that reasonably relates payor benefits to Commission regulatory activities.

By adopting this proposal, the Commission would eliminate the market distortions created by the existing capacity-based fee regime. Implementation of this proposal would eliminate discrimination against high-capacity private submarine cable systems, eliminate subsidization of common-carrier IBC fee payors, and encourage private submarine cable operators to offer new, more innovative, and more efficient services by reducing transaction costs and regulatory uncertainty.

By adopting this proposal, the Commission would also eliminate the monitoring, enforcement, and fairness problems inherent in the existing capacity-based fee regime. Tyco believes that the Commission should use employee- or employee-hour equivalents to establish a separate revenue requirement for private undersea cable operators, as there are no other principled rules of thumb for establishing such a requirement so as to comply with the Communications Act's tying of regulatory fees to Commission regulatory efforts..

Tyco's proposal is a narrow one, based on the Commission's deregulation of private submarine cables over the past decade and data demonstrating the how the Commission's current regulatory fee regime distorts the market for private submarine cable capacity. Tyco has taken no position on potential changes to the regulatory fee methodology for IBC fee payors other than private submarine cable operators, *e.g.*, international Section 214 authorization holders or satellite operators selling non-common-carrier capacity to end users. There may be merit in restructuring this fee category as it applies to payors other than submarine cable operators. There may also be reasons for retaining the current system for other IBC fee payors, if capacity-based fees function as a better proxy for Commission regulatory efforts in relation to those payors. Regardless, the record in the FY 2004 regulatory fees rulemaking would not support such changes for a broader class of payors absent the type of data and legal argumentation provided by Tyco with respect to private undersea cable operators. Tyco urges the Commission not to delay adoption of a system-based regulatory fee for private undersea cable operators pending such a showing, as the current capacity regime has continued to distort submarine cable capacity markets since Tyco first approached the Commission with its proposal in January 2004.

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Tyco Telecommunications (US) Inc. (“Tyco”) urges the Commission to adopt Tyco’s longstanding proposal to modify the regulatory fee regime for private submarine cable operators.¹ Specifically, the Commission should reclassify private submarine cable operators in a fee category separate from international bearer circuit fees (“IBC fees”), allocate the international bearer circuit revenue requirement between the two categories in accordance with the Act, and apply a flat per-cable-landing-license fee for private submarine cable operators.

The Commission should adopt Tyco’s proposal for the reasons set forth in its NPRM and in Tyco’s comments in the 2004 regulatory fees rulemaking. Tyco believes that the Commission has ample legal justification—and indeed is compelled—to amend its regulatory fee schedule to reclassify private submarine cable operators and establish a new regulatory fee, using a different methodology, for such operators.² Tyco further believes that a per-system fee regime would

¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2005, Notice of Proposed Rulemaking*, FCC 05-35, MD Docket No. 05-59 (rel. Feb. 15, 2005) (“NPRM”).

² See Letter from Kent D. Bressie *et al.*, Counsel for Tyco, to David Krech, FCC International Bureau, MD Docket No. 05-59 (Dec. 15, 2004) (“Reclassification Authority Letter”).

eliminate distortions in submarine cable capacity markets, and would be easier for the Commission to administer and enforce.

Tyco's proposal was and is a narrow one, based on the Commission's deregulation of private submarine cables over the past decade and data demonstrating the how the Commission's current regulatory fee regime distorts the market for private submarine cable capacity. Tyco has taken no position on potential changes to the regulatory fee methodology for IBC fee payors other than private submarine cable operators, *e.g.*, international Section 214 authorization holders or satellite operators selling non-common-carrier capacity to end users.³ There may be merit in restructuring this fee category as it applies to payors other than submarine cable operators. There may also be reasons for retaining the current system for other IBC fee payors, if capacity-based fees function as a better proxy for Commission regulatory efforts in relation to those payors. Regardless, the record in the FY 2004 regulatory fees rulemaking would not support such changes for a broader class of payors absent the type of data and legal argumentation provided by Tyco with respect to private undersea cable operators.⁴ Tyco urges the Commission not to delay adoption of a system-based regulatory fee for private undersea cable operators pending such a showing, as the current capacity regime has continued to distort submarine cable capacity markets since Tyco first approached the Commission with its proposal in January 2004.

Tyco's comments consist of five parts. In part I, Tyco provides background regarding its interest in this proceeding, the Commission's current regulatory fee regime for private undersea

³ See NPRM at 7 ¶ 17.

⁴ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2004, Report and Order*, 19 FCC Rcd. 11,662, 11,673-74 ¶¶ 26-30 (2004) ("2004 Regulatory Fees Order"); MD Docket No. 04-73.

cable operators, and its original proposal in the context of the 2004 rulemaking. In part II, Tyco explains why its proposal to reclassify private submarine cable operators in a separate fee category satisfies the Communications Act's requirements, including the requirement that regulatory fees reflect Commission efforts expended on regulatory activities for fee payors and the requirement that the Commission amend the schedule of fees to reflect changes in Commission activities resulting from changes in law or Commission regulations. In part III, Tyco explains why its proposal would eliminate the market distortions created by the existing capacity-based fee regime. In part IV, Tyco explains why its proposal would eliminate the monitoring, enforcement, and fairness problems inherent in the existing capacity-based fee regime. In part V, Tyco explains why the Commission should use employee- or employee-hour equivalents to establish a separate revenue requirement for private undersea cable operators, as there are no other principled rules of thumb for establishing such a requirement so as to comply with the Communications Act's tying of regulatory fees to Commission regulatory efforts.

I. BACKGROUND

A. Tyco Telecommunications

Tyco is one of the world's leading integrated suppliers of undersea communications systems and services and the only such U.S.-based supplier. Tyco designs, manufactures, installs, and provides maintenance services for undersea cable systems. Operating a modern fleet of cable ships stationed around the world, Tyco has installed approximately 350,000 kilometers of undersea communications systems. Tyco also operates the Tyco Global Network ("TGN"), including the Tyco Atlantic and Tyco Pacific submarine cable systems, for which

Tyco holds cable landing licenses from the Commission.⁵ As a consequence of its operation of Tyco Atlantic and Tyco Pacific, Tyco was one of the largest payors of IBC fees for FY 2004.

B. The Current Regulatory Fee Regime for Private Submarine Cables

The Commission does not assess separate regulatory fees on private submarine cable operators—or, for that matter, on submarine cable operators in general. Instead, it groups both private and common carrier submarine cables with other operators of “international bearer circuits.” In this respect, private submarine cable operators differ from geostationary and non-geostationary satellite operators, from whom the Commission collects regulatory fees on either a per-satellite basis (for geostationary satellite operators) or per-system basis (for non-geostationary satellite operators).⁶

While it has never codified the scope of those subject to IBC fees, the Commission has made its most definitive statements on the issue in informal fact sheets which it releases each year. The latest version of the fact sheet states:

Who Must Pay: Facilities-based common carriers with active international bearer circuits as of December 31, 2003 in any transmission facility for the provision of service to an end user or resale carrier. In addition, non-common carrier satellite operators must pay a fee for each circuit sold or leased to any customer, including themselves or their affiliates, other than an international common carrier

⁵ See *TyCom Atlantic (US) Inc.; Application for a License to Land and Operate a Private Fiber-Optic Cable System Between the United States Mainland and the United Kingdom, Cable Landing License*, 15 FCC Rcd. 14,881 (2000); *TyCom Networks (US) Inc. and TyCom Networks (Guam) L.L.C.; Application for a License to Land and Operate a Private Fiber-Optic Cable System Between the United States Mainland, Hawaii, Guam, and Japan, The TyCom Pacific Cable System, Cable Landing License*, 15 FCC Rcd. 24,078 (2000). Tyco has agreed to sell TGN (but not its manufacturing, supply, installation, or maintenance businesses) to Videsh Sanchar Nigam Limited. See Press Release: Tyco to Sell Its Tyco Global Network to India’s VSNL for \$130 Million (Nov. 1, 2004), available at http://www.tyco.com/tyco/press_release_detail.asp?prid=759.

⁶ See NPRM, Attachments D (proposed FY 2005 schedule of regulatory fees) & F (FY 2004 schedule of regulatory fees).

authorized by the Commission to provide U.S. international common carrier services. Private submarine cable operators are also to pay fees for any and all international bearer circuits sold on an indefeasible right of use (IRU) basis or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services.⁷

In 2004, the Commission also sought to address confusion among submarine cable operators and their customers by clarifying which operators were obligated to pay.⁸ But the Commission has yet to define clearly what constitutes “active” circuits or equivalents, although Commission staff have informally interpreted capacity to be “active” (at least with respect to capacity on fiber-optic systems) when both the fiber is lit and the capacity is sold.

Thus, facilities-based common carriers must pay IBC fees for all of their active international bearer circuits, while private submarine cable operators and satellite operators need only pay IBC fees for bearer circuits sold to entities other than common carriers.⁹ The Commission exempted capacity sales to carriers holding international Section 214 authorizations in order to avoid double-charging carriers (once for the capacity sale from the submarine cable or satellite operator to the U.S. international carrier, and once for the capacity sale from the U.S.

⁷ *Regulatory Fees Fact Sheet: What You Owe—International and Satellite Services Licensees for FY 2004* (July 2004) (“2004 Fact Sheet”), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-249904A4.doc.

⁸ *See Compliance With Regulatory Fee Requirements By Cable Landing Licensees Operating On A Non-Common Carrier Basis, Public Notice*, 19 FCC Rcd. 12,318 (2004) (“*Clarifying Public Notice*”) (clarifying that regulatory fee payment obligations apply regardless of: (1) the nationality of the licensee or of the licensee’s corporate parent; (2) whether the licensee sells capacity directly or through a U.S. or foreign affiliated sales or marketing subsidiary; (3) whether the licensee operates the licensed system on a common-carrier or non-common-carrier basis; (4) whether the licensee or its affiliated sales or marketing subsidiary sells capacity on a lease or IRU basis; or (5) the nature of the services provided by the operator’s customers using such capacity).

⁹ *See 2004 Fact Sheet*.

international carrier to its customers).¹⁰ In any event, the Commission expects that IBC fees will be paid once for all active international bearer circuits connecting the United States with foreign points.

As with all other regulatory fee categories, the Commission each year determines how much it needs to collect from international bearer circuit operators. Although the Act specifies that this “revenue requirement” must correlate with the regulatory benefits actually provided to international bearer circuit operators,¹¹ the Commission has yet to implement a formal and accurate cost-accounting system.¹² In any event, once it calculates the revenue requirement for the international bearer circuit category, the Commission (following the guidance originally set forth in the statute¹³) recovers this revenue by: (1) estimating how much active capacity exists among all international bearer circuit operators; and (2) using this estimate to calculate a fee based on active 64 KB circuits or circuit equivalents.

Last year, the Commission calculated a revenue requirement for international bearer circuits in the amount of \$7,068,733.¹⁴ Estimating that there would be 2,800,000 active 64 KB

¹⁰ See *Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Memorandum Opinion and Order*, 10 FCC Rcd. 12,759, 12,761 ¶¶ 10-11 (1995).

¹¹ See 47 U.S.C. § 159(b)(1)(A), (i).

¹² See *Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, Report and Order, 18 FCC Rcd. 15,985, 16,040-41 (2003) (concurring statement of Commissioner Adelstein) (discussing cost accounting); *Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, Report and Order, 16 FCC Rcd. 13,525, 13,529 ¶¶ 7-8 (2001) (“2001 Fees Order”) (discussing problems with previous cost accounting system).

¹³ See 47 U.S.C. § 159(g); see also *Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Final Rule*, 59 Fed. Reg. 30,984 (1994) (setting forth initial regulatory fee schedule, including international bearer circuit fees).

¹⁴ See *2004 Regulatory Fees Order*, 19 FCC Rcd. at 11,702 (Attachment C).

circuits or circuit equivalents, it established a regulatory fee of \$2.52 per circuit or circuit equivalent.¹⁵ This year, it has calculated a revenue requirement for international bearer circuits in the amount of \$7,244,186.¹⁶ Estimating that there will be 3,600,000 active 64 KB circuits or circuit equivalents, it proposes a regulatory fee of \$2.01 per circuit or circuit equivalent.¹⁷

C. Tyco's Proposal and the FY 2004 Regulatory Fees Rulemaking

In its comments in the FY 2004 rulemaking, Tyco advanced a proposal to fix the broken regulatory fee regime for private undersea cable operators. Tyco explained in detail why the Commission's existing IBC fee methodology was inconsistent with the Communications Act, distorted the market for undersea cable capacity, and used outdated and inaccurate capacity estimates to establish the IBC fee level each year.¹⁸ In response, the Commission acknowledged the merit of most of Tyco's arguments, concluding that "a fee system based on licenses, rather than circuits, would be administratively simpler for both the Commission and carriers," and finding that "basing the fees on the active circuits may provide disincentives to carriers to initiate new services and to use new facilities efficiently."¹⁹ Substantively, the proposal on which the Commission presently seeks comment is identical to Tyco's original proposal.

¹⁵ *Id.*

¹⁶ *See* NPRM at Attachment C.

¹⁷ *See* NPRM at Attachment C.

¹⁸ *See* Comments of Tyco Telecommunications (US) Inc. at 6-19 (filed Apr. 21, 2004) ("Tyco 2004 Rulemaking Comments"). Among other shortcomings, Tyco noted the Commission's existing IBC methodology relies essentially on revisions of past guesses regarding active capacity—an inaccurate process.

¹⁹ *2004 Regulatory Fees Order*, 19 FCC Rcd. at 11,672 ¶ 29 (2004).

First, Tyco proposes that the Commission reclassify private submarine cable operators in a new fee category separate from IBC fees.²⁰ Under this proposal, there would be two *separate* categories of fees—facilities-based common carriers would be in one category, and private submarine cable operators would be in the other.

Second, Tyco proposes that the Commission allocate the revenue requirement now proposed for all international bearer circuit operators (\$7,244,186) between the two new categories.²¹ In doing so, the Commission must determine the respective regulatory burden caused by the two new categories of payees.²² As discussed above, facilities-based common carriers cause the Commission far greater regulatory burden than do private submarine cable operators. Under Section 9 of the Act, the Commission’s allocation must reflect this disparity.

Third, Tyco proposes that the Commission adopt a flat, per-cable-landing-license fee for private submarine cable operators.²³ In other words, each private submarine cable operator would pay a flat annual fee for each cable landing license it possesses. This system-based approach would ensure that the Commission recovers regulatory costs from all of the private submarine cable operators that generate such costs. Accordingly, the per-license approach ensures that each private submarine cable operator’s fees better reflect the regulatory costs it imposes on the Commission.

²⁰ See NPRM at 6 ¶ 14; Tyco 2004 Rulemaking Comments at 20.

²¹ See NPRM at 6 ¶ 14; Tyco 2004 Rulemaking Comments at 20.

²² As previously noted, Section 9(b) of the Communications Act requires the FCC to derive its regulatory fees “by determining the full-time equivalent number of employees performing the [regulatory activities for the service in question] . . . adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.” 47 U.S.C. § 159(b)(1)(A).

²³ See NPRM at 6 ¶ 14; Tyco 2004 Rulemaking Comments at 20.

II. THE COMMISSION HAS AMPLE LEGAL JUSTIFICATION—AND INDEED IS COMPELLED—TO RECLASSIFY PRIVATE SUBMARINE CABLE OPERATORS IN A SEPARATE FEE CATEGORY

Tyco believes that the Commission has ample legal justification—and indeed is compelled—to amend its regulatory fee schedule to reclassify private submarine cable operators and establish a new regulatory fee for such operators.²⁴ A system-based fee regime would comport with the Communications Act’s requirements that: (1) regulatory fees reflect Commission efforts expended on regulatory activities for fee payors, and (2) such a reclassification satisfy the criteria for a “permitted amendment” to the schedule of regulatory fees.

A. Regulatory Fees Paid by Private Undersea Cable Operators Are No Longer “Reasonably Related to the Benefits Provided to the Payor of the Fee by the Commission’s Activities

The regulatory fees paid by private submarine cable operators are no longer “reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”²⁵ By contrast, a system-based fee regime would comply with this statutory requirement.

Section 9 of the Communications Act requires the Commission to recover through annual regulatory fees the costs that it incurs in carrying out enforcement actions, policymaking and rulemaking activities, international services, and user information services.²⁶ Section 9(b)(1)(A) requires the Commission to derive its regulatory fees “by determining the full-time equivalent number of employees performing the [regulatory activities for the service in question] . . . adjusted to take into account factors that are reasonably related to the benefits provided to the

²⁴ See NPRM at 7 ¶ 16.

²⁵ 47 U.S.C. § 159(b)(1)(A).

²⁶ See 47 U.S.C. § 159.

payor of the fee by the Commission's activities."²⁷ Section 9(i) of the Act requires the Commission to develop "accounting systems necessary to making the adjustments" that would ensure that an operator's regulatory fees reflect the regulatory costs it generates.²⁸ If the Commission determines that current fees do not reflect the public interest or the regulatory costs generated by a particular entity, the Commission must amend its fee schedule.²⁹

The existing capacity-based fee regime no longer satisfies the requirements of Section 9 of the Act because it overcharges private, high-capacity submarine cable operators in relation to the Commission's regulatory activities, resulting in market distortions that disserve the public interest.³⁰ The capacity-based regime relies on the Commission's tally of "active capacity" in apportioning fees, even though an operator's active capacity does not reflect the regulatory costs it generates.³¹ The existing capacity-based system also imposes the same fees on all international bearer circuit operators even though the Commission spends significantly less money regulating private submarine cable systems than it does regulating facilities-based common carriers.³² A system-based fee regime would better comport with the statutory requirement of tying regulatory fees to regulatory benefits.

By contrast, Tyco's proposed system-based regime for private submarine cable operators comports fully with the Act. This proposal would advance the public interest, as required by

²⁷ 47 U.S.C. § 159(b)(1)(A).

²⁸ 47 U.S.C. § 159(i).

²⁹ See 47 U.S.C. § 159(b)(3) (stating that "the Commission shall . . . amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A).").

³⁰ Regarding market distortions, *see* part III.A, B below.

³¹ See Tyco 2004 Rulemaking Comments at 6-15; part III.B below.

³² See Tyco 2004 Rulemaking Comments at 11-13; part III.B below.

Section 9(b)(1)(A) of the Act, by eliminating these overcharges and distortions. Moreover, the system-based proposal would better align payors' regulatory fees with the regulatory costs they create, thereby ensuring the proportionate cost recovery required by the Act.³³ Most importantly, by implementing the proposed system-based fee regime, the Commission would fulfill its statutory obligation to amend regulatory fees when (as now) the existing system disserves the public or fails to reflect fee payors' regulatory costs in a proportional manner.³⁴

B. The Commission Must Reclassify Private Submarine Cable Operators in a Separate Fee Category to Reflect Reduced Regulation Resulting from Changes in Law and in the Commission's Own Regulations

Tyco believes that the Commission should and must use its "permitted amendment" authority to reclassify private undersea cable operators in a new and separate fee category using a methodology, such as a per-system flat fee, that reasonably relates payor benefits to Commission regulatory activities.³⁵ Section 9 requires the Commission to amend the schedule of regulatory fees when it finds that a Commission rulemaking or change in law has added, deleted, or changed the Commission services provided to the payor of the fee such that the fee no longer reasonably relates to the benefits of those services.³⁶

For the reasons set forth more fully in Tyco's Reclassification Authority Letter, Tyco believes that the Commission must amend the schedule of regulatory fees to reflect changes in Commission services provided to submarine cable operators resulting from Commission rulemakings and changes in law, including: (1) the entry into force of U.S. commitments in

³³ See 47 U.S.C. § 159(b)(1)(A) (authorizing "adjust[ments] to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities").

³⁴ See 47 U.S.C. § 159(b)(3).

³⁵ See NPRM at 7 ¶ 16 n.21.

basic telecommunications under the World Trade Organization General Agreement on Trade in Services and the Commission's implementation thereof through rule changes in its *Foreign Participation Order*; (2) the Telecommunications Act of 1996 and the Commission's related international Section 214 streamlining rulemakings; and (3) the Commission's submarine cable streamlining rulemaking.³⁷ As a result of these pro-competitive changes in the law and in the Commission's rules, private submarine cable operators' capacity has skyrocketed, their prices have plummeted, and the cost of regulating them has dropped.

III. TYCO'S PROPOSAL WOULD ELIMINATE THE MARKET DISTORTIONS CREATED BY THE EXISTING CAPACITY-BASED FEE REGIME FOR PRIVATE UNDERSEA CABLE OPERATORS

Tyco urges the Commission to adopt a system-based fee regime—which more closely reflects the regulatory costs these system generate—in order to eliminate the market distortions created by the existing capacity-based regulatory fee regime.³⁸ Only by reclassifying private submarine cables into a separate fee category could the Commission address these distortions and serve the public interest, as the distortions result from the tying of the fee level to capacity levels.³⁹

A. A System-Based Fee Would Recognize Fundamental Technological Changes and Thereby Eliminate the Discrimination Against High-Capacity Private Submarine Cable Systems

A system-based fee regime for private undersea cable operators would recognize fundamental technological changes and thereby eliminate discrimination against high-capacity private submarine cable systems. Technological change (coupled with deregulation and

³⁶ 47 U.S.C. § 159(b)(1)(A), (3). *See also* Reclassification Authority Letter at 1-3.

³⁷ *See id.* at 4-10.

³⁸ *See* NPRM at 6 ¶ 14 (describing Tyco's proposal).

liberalization) has produced exponential capacity increases and plunging bandwidth prices so that capacity-based fees now comprise an outsized and substantial cost component for submarine cable capacity. Given current trends with respect to capacity prices and regulatory fees, the Commission's capacity-based fee regime may soon render uneconomic certain submarine cable capacity sales and cable investments.

As noted previously, Congress adopted the original capacity-based fees regime in 1993, when undersea cable capacity increased annually by relatively small increments, limited by technology that required new construction for significant capacity upgrades, as well as by substantial regulation and application of the ECO test in the pre-WTO-liberalization era.⁴⁰ In the past decade, however, however, the market for international capacity has changed radically. Booming demand for capacity, coupled with liberalization and deregulation, attracted operators, other than traditional carriers, to invest substantial sums in high-capacity systems and to develop new technologies. These operators can now upgrade system capacity simply by changing the electronics in the cable stations, allowing for a doubling, quadrupling, or more of capacity without putting a new cable in the water.

Submarine operators have increased trans-oceanic capacity more than twenty-fold since 1998 and cut per-unit capacity prices dramatically. Trans-Atlantic capacity jumped by approximately 1800 percent from 1998 to 2003—the most recent years for which data is

³⁹ See *id.* at 7 ¶ 16 (seeking comment on computational changes versus reclassification).

⁴⁰ See Tyco 2004 Rulemaking Comments at 7.

available—while trans-Atlantic capacity prices dropped by 116 percent.⁴¹ Similarly, trans-Pacific capacity increased by 2500 percent in the same time period while prices declined by 146 percent.⁴² These trends are likely to continue.⁴³

As detailed in Tyco's comments in the 2004 rulemaking, IBC fees have decreased at a much slower rate than the per-unit price, meaning that the fees represent an increasingly large component of overall per-unit price.⁴⁴ At the same time that capacity has surged and prices have dropped to less than a tenth their 1998 level, corresponding per-unit regulatory fees have declined by only 62 percent.⁴⁵

This fee regime distorts the international capacity market without any justifiable regulatory basis. An operator that doubles the capacity of its system by changing the electronics in its cable stations must pay double the regulatory fees, even though the Commission exercises no regulatory oversight over, or incurs identifiable regulatory costs for, such capacity upgrades.

⁴¹ See INTERNATIONAL BANDWIDTH 2004 VOLUME 1: SUBMARINE NETWORKS, at 92 (TeleGeography 2004) (noting that trans-Atlantic capacity prices dropped approximately 26 percent between 2002 and 2003; Tyco 2004 Rulemaking Comments at 8 (noting that trans-Atlantic capacity prices dropped 90 percent between 1998 and 2002). Note that available capacity did not change between 2002 and 2003, as no new trans-Atlantic submarine cable systems were placed into service.

⁴² See INTERNATIONAL BANDWIDTH 2004 VOLUME 1: SUBMARINE NETWORKS, at 93 (TeleGeography 2004) (noting that trans-Pacific capacity prices dropped approximately 56 percent between 2002 and 2003; Tyco 2004 Rulemaking Comments at 9 (noting that trans-Pacific capacity prices dropped 90 percent between 1998 and 2002). Note that available capacity did not change between 2002 and 2003, as no new trans-Pacific submarine cable systems were placed into service.

⁴³ See INTERNATIONAL BANDWIDTH 2004 VOLUME 1: SUBMARINE NETWORKS, at 93

⁴⁴ See Tyco 2004 Rulemaking Comments at 9-10.

⁴⁵ In fiscal years 1999 and 2000, the FCC imposed international bearer circuit fees of \$7.00 per 64 KB circuit equivalent; in fiscal year 2001 the fee dropped to \$5.00 per 64 KB circuit equivalent; in fiscal year 2002 it fell again to \$2.00; and in fiscal year 2003—the year most recent year for which comparable capacity price data is available—it rose back up to \$2.67.

(The Commission does not require any consent for such a capacity upgrade, and it does not track such an upgrade through a periodic filing by the operator.)

Moreover, this fee regime discriminates in favor of low-capacity system operators. All other things being equal, a single high-capacity submarine cable system may pay regulatory fees hundreds of times higher than a low-capacity submarine cable system, even though those systems impose identical regulatory costs on the Commission. Both require only a single landing license and are otherwise subject to identical Commission rules and regulatory obligations. By moving to a system-based fee regime, the Commission would eliminate this disincentive to deployment of high-capacity undersea cable systems and better comply with the Communications Act's criterion that regulatory fees mirror regulatory benefit.

B. A System-Based Fee Regime Would Eliminate Subsidies by Private Submarine Cable Operator of Commission Activities Undertaken with Respect to Facilities-Based Common Carriers

A system-based fee regime would eliminate subsidies by private submarine cable operator of Commission activities undertaken with respect to facilities-based common carriers. By separating private submarine systems (which generate smaller regulatory costs) from other international bearer circuit operators (which generate larger regulatory costs) for purposes of regulatory fee recovery, the Commission can ensure that all international bearer circuit operators and end users are exposed to prices that reflect actual market conditions and costs, not prices resulting from subsidies caused by an out-of-date regulatory regime.

In streamlining its regulation of submarine cables in 2001, the Commission explained that it intended "to facilitate the expansion of capacity and facilities-based competition in the submarine cable market," and "to enable submarine cable applicants and licensees to respond to the demands of the market with minimal regulatory oversight and delay, saving time and resources for both industry and government, while preserving the Commission's ability to guard

against anti-competitive behavior.”⁴⁶ By contrast, facilities-based international telecommunications service providers, *i.e.*, common carriers, remain subject to the panoply of Part 63 regulations promulgated pursuant to Title II of the Act.⁴⁷ Facilities-based common carriers are subject to a broad range of regulatory obligations that do not apply to private submarine cable operators, and that consume significant Commission resources. These include obligations to:

- Request global authority from the Commission for provision of telecommunications services—a process that entails an analysis of the operator’s home market, the WTO status of the operator’s home country, and applicable public interest factors;⁴⁸
- File with the Commission all intercarrier contracts, including any correspondent agreements;⁴⁹

⁴⁶ *Review of Commission Consideration of Applications under the Cable Landing License Act*, Report and Order, 16 FCC Rcd. 22,167, 22,168 ¶ 1 (2001) (“*Submarine Cable Streamlining Order*”).

⁴⁷ The Commission has proposed to eliminate some of these reporting requirements and, more troublingly, to increase the regulatory burdens on private submarine cable operators by requiring them to comply with some of these common-carrier-like reporting requirements. *See Reporting Requirements for U.S. Providers of International Telecommunications Services, Amendment of Part 43 of the Commission’s Rules, Notice of Proposed Rulemaking*, 19 FCC Rcd. 6460, 6482-83 ¶¶ 58-60 (2004) (“*Reporting Requirement NPRM*”). The Commission’s proposal to increase the reporting-related regulatory burden of private submarine cable operators is wholly inconsistent with the Commission’s 2002 streamlining and further deregulation of private submarine cable operators, and indeed with the very foundations of non-regulation of private submarine cable operators. *See Review of Commission Consideration of Applications under the Cable Landing License Act, Report and Order*, 16 FCC Rcd. 22167 (2001); *see also Tel-Optik Limited; Application for a license to land and operate in the United States a submarine cable extending between the United States and the United Kingdom, Memorandum Opinion and Order*, 100 FCC.2d 1033, 1046-48 ¶¶ 28-31 (rel. April 5, 1985) (concluding that private submarine cables are subject to the Cable Landing License Act, but not to the panoply of Title II regulation that applies to common carriers). The Commission should reject as illegitimate any attempt to equalize the regulatory costs of common carriers and private submarine cable operators by greatly increasing the regulatory burdens on private submarine cable operators through a “leveling up” process.

⁴⁸ *See* 47 U.S.C. § 214; 47 C.F.R. § 63.18.

- File annual traffic reports with the Commission;⁵⁰
- File annual circuit status reports with the Commission;⁵¹
- Comply with the FCC's international settlements policy, which establishes benchmark rates and deadlines;⁵² and
- Provide adequate notice to all affected customers before discontinuing, reducing, or impairing service.⁵³

The paucity of Commission forms relating to private undersea cable operators only underscores this point. Of the 22 forms available for electronic filings on IBFS, only one relates to private undersea cable operators.⁵⁴

By issuing a cable landing license for a private submarine cable system, the Commission issues a facilities authorization for landing, construction, and operation.⁵⁵ By regulating such a system on a non-common-carrier basis, the Commission makes a determination that services sold by the operator do not require the sort of regulatory scrutiny that common-carrier services do.⁵⁶ Unsurprisingly, private submarine cable operators typically have limited interaction with the Commission following initial licensing, absent actions such as: (1) the acquisition of a new foreign carrier affiliation in a destination market for the system; (2) a transaction involving a

⁴⁹ See 47 C.F.R. §§ 43.51(a)(1), 63.21(b).

⁵⁰ See 47 C.F.R. §§ 43.61(a)(1), 63.21(d).

⁵¹ See 47 C.F.R. § 43.82.

⁵² See 47 C.F.R. § 63.10(e).

⁵³ See 47 C.F.R. § 63.19(a)(1).

⁵⁴ See *International Bureau Filing System, Order*, 19 FCC Rcd. 4575 (OMD 2004); <http://svartifoss2.fcc.gov/myibfs/web/userHome.do> (pulldown menu).

⁵⁵ See “An act relating to the Landing and Operation of Submarine Cables in the United States,” *codified at* 47 U.S.C. §§ 34-39 (“Cable Landing License Act”); Executive Order No. 10,530, *codified at* 3 C.F.R. 189 (1954-1958), *reprinted in* 3 U.S.C. § 301 app. (1988); 47 C.F.R. § 1.767.

⁵⁶ See *Submarine Cable Streamlining Order*, 16 FCC Rcd. at 22,168 ¶ 1.

substantial assignment or transfer of control; (3) other ownership changes requiring additional licensees beyond the existing ones (*e.g.*, ownership of the cable station or surpassing of the 5-percent-or-greater threshold for licensees); (4) or physical modification of the licensed facilities.

By reclassifying private submarine cable operators into a fee category separate from IBC fees, the Commission would eliminate this subsidy to common-carrier IBC fee payors. The Commission would also better tie the regulatory fees of private submarine cable operators to the regulatory costs they generate for “enforcement activities, policy and rulemaking activities, user information services, and international activities.”⁵⁷

C. A System-Based Fee Regime Would Encourage Private Submarine Cable Operators to Offer New, More Innovative, and More Efficient Services by Reducing Transaction Costs and Regulatory Uncertainty

Tyco agrees strongly with the Commission’s conclusions that a system-based fee regime would encourage private submarine cable operators to offer new, more innovative, and more efficient services.⁵⁸ It would do so by reducing regulatory uncertainty and transaction costs.⁵⁹ Consequently, capacity purchasers—and ultimately U.S. consumers and business—would benefit from more innovative and efficient services, in addition to lower prices for international connectivity.

As Tyco noted in its FY 2004 rulemaking comments, the existing capacity-based fee regime requires submarine cable operators to expend significant regulatory resources trying to determine whether and when fees apply, often reaching different conclusions for very similar services, and hesitating to offer particular services given the difficulty in making sense of the

⁵⁷ 47 U.S.C. § 159(a)(1).

⁵⁸ See NPRM at 6-7 ¶ 15.

⁵⁹ See Tyco 2004 Rulemaking Comments at 13.

Commission's fee regime in light of particularly innovative offerings. This regulatory uncertainty hampers operators' cost recovery efforts. The Commission's 2004 public notice clarifying who must pay did address some of this uncertainty.⁶⁰ But it did not remedy any of the confusion or uncertainty regarding the meaning of "active" capacity, which Commission staff have interpreted informally to mean lit and sold. This "lit and sold" standard may have been adequate when applied to a traditional capacity sale or lease. But it works less well when applied to the panoply of newer capacity offerings that today's customers now demand from private submarine cable operators.

First, operators often sell what might be called "risk-management" or "insurance-like" offerings, which de-couple customer payments from the lighting, allocation, or use of capacity. For example, private submarine cable operators (including Tyco) offer a "restoration" service, whereby the customer pays up front for the ability to use back-up capacity at a later date in the event of a primary circuit failure. The operators price the service on the probability that the customers will actually use the capacity, with the presumption that they will not do so except in extreme circumstances, such as cable damage resulting from commercial fishing operations or underwater seismic activity. Similarly, private submarine cable operators (including Tyco) offer usage-based services, whereby a customer pays a set amount for capacity that may fluctuate or ramp up over time. In each of these cases, it is extremely difficult to apply the Commission's "lit and sold" rule of thumb with respect to regulatory fees, as the payment is generally made up front for capacity that may never be activated or allocated for a particular customer. Under the current regulatory fee regime, private submarine cable operators find themselves forced to make distinctions of degree with respect to the applicability of regulatory fees to these kind of

⁶⁰ *Clarifying Public Notice*, 19 FCC Rcd. at 12,318.

services—for example, between the “restoration” service described above (which is presumably subject to regulatory fees) and a “reservation” service, where customers make a very small payment to reserve unlit capacity (and which is therefore presumably not subject to regulatory fees). Parsing through these kinds of distinctions consumes significant regulatory resources. Moreover, such parsing causes extraordinary difficulty in commercial negotiations with customers who often do not understand the vagaries of the Commission’s regulatory fee system.

Second, operators often sell capacity under long-term arrangements—sometimes as long as 15 years—with a single payment up front. Regulatory fees on this capacity, however, are assessed every year. Thus, there is often a disconnect between operators’ receipt of revenues for given capacity and their obligation to pay regulatory fees for such capacity. The inability of the Commission’s capacity-based fee regime to account for new and innovative capacity offerings creates economic distortions that favor certain services and capacity offerings over others (and, perhaps, favor submarine cable operators that stretch the boundaries of the law over those that do not). Moreover, the current regime can prevent private submarine cable operators from adequately recovering their costs. This, in turn, hinders the offering of innovative service offerings and capacity arrangements more generally.

Under a system-based fee regime, a private submarine cable operator would no longer have to spend time and money determining whether (and when) a risk-management service triggers regulatory fees, or convincing skeptical customers that its interpretation of the Commission’s fee guidance is correct. Moreover, an operator could simply offer capacity on whatever basis its customers wanted, rather than on a basis that it thought would avoid regulatory fees. A system-based fee for private submarine cable operators would thus make commercial negotiations easier, place all operators on a level playing field, and, most importantly, allow new

products and services to rise and fall on their own merits rather than as a result of regulatory-fee distortions.

IV. TYCO'S PROPOSAL WOULD ELIMINATE THE MONITORING, ENFORCEMENT, AND FAIRNESS PROBLEMS INHERENT IN THE CURRENT CAPACITY-BASED FEE REGIME

Tyco agrees strongly with the Commission's conclusion that a system-based fee regime private submarine cable operators would eliminate the monitoring and enforcement problems created by the current capacity-based regime.⁶¹ Such a system would also be more fair. Tyco's proposal would remedy the information asymmetry (which forces the Commission to rely on outdated and inaccurate capacity information), eliminate operator incentives to game the Commission's rules, and provide a bright-line rule for enforcement purposes.

The Commission presently has no means of monitoring active private submarine cable capacity, and thus no real way of enforcing private submarine cable operator's payment of regulatory fees.⁶² The International Bureau calculates its payment units each year based primarily on the previous year's payment records, meaning that the accuracy of the Commission's estimates is only as good as operators' compliance with the Commission's regulatory fee obligations. As the Commission's issuance of the *Clarifying Public Notice* suggests, operators—whether intentionally or not—have not necessarily complied with these obligations.⁶³ In its comments in the 2004 rulemaking, Tyco described in detail how this system

⁶¹ See NPRM at 6-7 ¶ 15.

⁶² The Commission has not moved to adopt its original proposal to require private submarine cable operators to file circuit status reports. See *Reporting Requirement NPRM*, 19 FCC Rcd. at 6482-83 ¶¶ 58-60.

⁶³ See *Clarifying Public Notice*, 19 FCC Rcd. at 12,318.

may lead the Commission to systematically underestimate the amount of active capacity subject to regulatory fees.⁶⁴

Tyco has also noted previously that the current capacity-based fee regime gives operators an incentive to game the Commission's practice of assessing fees based on a "snapshot" of capacity on December 31st of each year.⁶⁵ Operators have an incentive to ask customers to pay for capacity purchases on the first of January, so as to regulatory fee purposes. Operators also have an incentive to collude with their customers to take capacity off line on December 31st , so as to avoid having such capacity considered "lit," and therefore "active," for regulatory fee purposes. Such gamesmanship obviously makes the Commission's monitoring and enforcement job more difficult, and it places a greater payment burden on those operators who do comply with the spirit of the Commission's requirements.

By contrast, a system-based fee regime would simplify and strengthen the Commission's calculation of fees and monitoring of fee payors while enhancing payor compliance and the fairness of the regulatory fee regime. The universe of fee payors would consist of every private submarine cable operator with a cable landing license. The amounts to be paid would be derived by dividing the revenue requirement for private submarine cable operators by the number of cable landing licenses held by such operators. Licensee information is publicly available and easily verifiable. The Commission would no longer need to rely on operators' own regulatory fee paperwork in order to estimate payment units. Nor would it need to impose intrusive and burdensome reporting requirements to ensure that all private submarine cable operators pay their

⁶⁴ See Tyco 2004 Rulemaking Comments at 16.

⁶⁵ See Tyco 2004 Rulemaking Comments at 17.

share of the fees—a system that would still provide the Commission with dated information at best.

V. THE COMMISSION SHOULD USE AN EMPLOYEE- OR EMPLOYEE-HOUR EQUIVALENT TO ESTABLISH THE REGULATORY FEE REVENUE REQUIREMENT FOR PRIVATE SUBMARINE CABLES

Tyco believes that the Commission should use an employee- or employee-hour equivalent to establish the regulatory fee revenue requirement for private submarine cables. As Tyco's comments in part III above and in the FY 2004 rulemaking demonstrate, the Commission licenses and regulates private submarine cable operators in a radically different manner than international telecommunications services providers. Given these differences, Tyco believes that it is particularly difficult for the Commission to craft a principled rule of thumb to establish such a revenue requirement for private undersea cable operators (and thereby reallocating the existing revenue requirement for the IBC fee category) other than the one suggested in the Communications Act itself: an employee- or employee-hour equivalent as a proxy for regulatory activity.

The alternatives to this employee- or employee-hour equivalent are unappealing because they are complex, poor proxies for regulatory effort, or unprincipled and easily gamed by interested parties. These alternatives include methods that allocate existing revenue requirement between IBC fees and private submarine cable fees based on a ratio created by comparing the following for IBC fee payors and private submarine cable payors:

- ***Number of licenses or authorizations:*** By lumping all licenses together, the Commission would ignore the fact that it expends much more effort regulating some licensees or authorization holders than others. In particular, it ignores the fact that the Commission expends more effort regulating international common carriers than it does for private submarine cable operators.

- ***Number of regulatory fee payors:*** This approach suffers from the same defects as the counting of the number of licenses or authorizations, as noted above.
- ***Number of filings made by payors:*** This approach is flawed for at least three reasons. *First*, the variety of filings and the fact that many are not recorded electronically makes counting difficult. *Second*, Commission reliance on filings made electronically would consider either an excessively narrow category of Commission regulatory activities, or confuse regulatory activities already covered by other fees. By counting filings made through ECFS, the Commission would address regulatory activities relating only to rulemakings. By counting filings made through IBFS, the Commission would confuse the basis for collecting regulatory fees with the basis for application processing fees, even though many of the filings made through IBFS do not require payment of application processing fees. *Third*, this approach would provide operators with a perverse incentive to avoid making filings that might otherwise be required under the Commission’s rules, solely in an effort to reduce regulatory fees.
- ***Operator revenues:*** To use operator revenues, the Commission would need to impose new reporting requirements on private submarine cable operators solely for regulatory fee calculation purposes—an expensive and burdensome exercise. Moreover, operator revenues are a particularly poor proxy given the lack of connection between those revenues and Commission regulatory activities.
- ***Active capacity of payors:*** Obviously, an allocation based on capacity would defeat the entire purpose of moving away from capacity-based fees for private submarine cable operators.

Each of these approaches is fraught with problems. Tyco therefore believes that there is no easy or principled short-cut for allocating the existing revenue requirement between the IBC fees and private submarine cable fees.

Instead, the Commission should hew to the statutory language directing the Commission to tie regulatory fees to regulatory efforts on behalf of payors. Section 9(b) of the Communications Act directs that regulatory fees assessed under Section 9(a) shall “be derived by determining the full-time equivalent number of employees performing the activities described in [Section 9(a)].”⁶⁶ This subsection is titled “Establishment and adjustment of regulatory fees.” In

⁶⁶ 47 U.S.C. § 159(b)(1)(A).

the present case, by reclassifying private submarine cable operators in a new fee category subject to per-license fees, the Commission would “establish” regulatory fees.

CONCLUSION

For the foregoing reasons and those identified in the NPRM, Tyco urges the Commission to reclassify private submarine cable operators in a fee category separate from IBC fees, allocate the international bearer circuit revenue requirement between the two new categories in accordance with the Act, and apply a flat per-cable-landing-license fee for private submarine cable operators.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kent D. Bressie", is written over a horizontal line.

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